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No. 80-2205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois,

Petitioner,

v.

TONI MURRAY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW TO FILE A BRIEF AMICUS CURIAE AND BRIEF FOR THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

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MOTION OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW TO FILE A BRIEF AMICUS CURIAE

The Chicago Lawyers' Committee for Civil Rights Under Law hereby respectfully moves for leave to file a brief amicus curiae in the above-captioned case in support of the Respondent. The consent of the attorney for the Respondent has been obtained. The consent of the attorney for the Petitioner was requested but refused.

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States. Its purpose was and still is to involve private attorneys throughout the country in a national effort to assure civil rights to all Americans. The Chicago Lawyers' Committee for Civil Rights Under Law ("the Lawyers' Committee") was organized in 1969 as one

of many such committees throughout the country. Over the past thirteen years, the Lawyers' Committee has enlisted the services of hundreds of members of the private bar in addressing the legal problems faced by minorities and the poor in obtaining equal legal representation and in confronting legal issues arising in voting, employment, housing, municipal services, the administration of justice, and law enforcement.

This case touches upon the adequacy of ministerial procedures established by the Clerk of the Circuit Court of Cook County, Illinois to give full effect to judicial orders and assure the efficient operation of a large metropolitan court system in conformity with the requirements of due process. It also poses the question whether an elected official can claim absolute official immunity as an officer of the court even when he fails to carry out a court order thereby leading to an undisputed violation of an individual's basic civil rights.

The interest of the Lawyers' Committee in the instant case arises from the unwarranted threat the broad position put forth by Petitioner poses to the availability of 42 U.S.C. § 1983 to the poor and minorities as an effective means to redress violations of individual civil rights occasioned by state action. Because 42 U.S.C. § 1988 permits a successful section 1983 plaintiff to recover his attorney's fees and costs, that section is often the only means of redress for the poor and minorities whose civil rights have been denied. The position urged by Petitioner has far-reaching implications that extend beyond disposition of the instant case. For Petitioner's position allows no principled distinction between extending immunity to the conduct challenged herein and any failure to perform a ministerial act by countless other officials at all levels of government.

Because of the Lawyers' Committee's interest in the outcome of this case and because Respondent cannot fairly be expected to address in complete fashion the broader implications of Petitioner's position while also effectively arguing the merits of her position, the Lawyers' Committee respectfully requests leave to file the attached brief amicus curiae. The arguments set forth in the brief amicus curiae are relevant to disposition of this case.

Respectfully submitted,

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BRIEF FOR THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States. Its purpose was and still is to involve private attorneys throughout the country in a national effort to assure civil rights to all Americans. The Chicago Lawyers' Committee for Civil Rights Under Law was organized in 1969 as one of many such committees throughout the country. Over the past thirteen years, the Chicago Lawyers' Committee for Civil Rights Under Law has enlisted the services of hundreds of members

of the private bar in addressing the legal problems faced by minorities and the poor in obtaining equal legal representation and in confronting legal issues arising in voting, employment, housing, municipal services, the administration of justice, and law enforcement.

This case touches upon the adequacy of procedures established by the Clerk of the Circuit Court of Cook County, Illinois to give full effect to judicial orders and assure the efficient operation of a large metropolitan court system in conformity with the requirements of due process.* It also poses the question whether an elected official can claim absolute official immunity as an officer of the court even when he fails to carry out a court order thereby leading to an undisputed violation of an individual's basic civil rights.

Amicus curiae contends that no reason exists, either on the facts or in the law, that requires this Court to extend absolute immunity from civil liability to this particular public official. The most appropriate disposition of this matter would be to summarily affirm the decision of the Court of Appeals for the Seventh Circuit. In the alternative, the writ should be dismissed as improvidently granted.

This Court should adhere to its practice of adjudicating constitutional questions only when the facts are clear and when such adjudication is necessary to the proper disposition of a case. Neither criteria prevails here. Remand for further discovery in conformity with the opinion of the court of appeals would permit the development of a proper factual record and would obviate the need for resolution of constitutional issues that are posed with marked lack of clarity on the present record.

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* The geographic area covered by Cook County includes Chicago and certain surrounding suburban areas.

STATEMENT OF FACTS

The relevant undisputed facts in this matter are as follows. Respondent's purse and checkbook were stolen. The theft was reported to the police. Six to twelve months thereafter some of the stolen checks were cashed. Respondent was then arrested on charges of deceptive practices. A hearing was held on November 4, 1974 in one of the branch courts of the Circuit Court of Cook County. All charges against her were dismissed except one which was continued until December 9, 1974. Respondent erroneously understood all the charges to have been dismissed. Therefore, on December 9, 1974 she failed to appear in court. A warrant issued for her arrest. Hearing of the warrant, she voluntarily appeared in court on January 13, 1975 and the judge then sitting entered an order quashing the warrant and directed that the necessary forms to recall the arrest warrant be processed. This judicial order was never carried out.

The deputy clerk, assigned to the court on that day, averred in an affidavit that, to the best of his recollection, he filled out a warrant recall form as directed by the judge. To the best of his recollection, copies of the warrant recall form were bundled together and placed in the "out work" for that day. Other deputy clerks, also under the supervision and control of the Clerk of the Court, were to be responsible for delivery of the warrant recall form to the Chicago Police Department. [App. 36].

The Chicago police officer assigned as "warrant sergeant" to the Warrant Division at Chicago Police Headquarters in an affidavit denied that the warrant recall form was duly processed. He attested that he could find no record on the court transmittal sheets, the

official court record of the daily court proceedings, that the recall of the warrant had ever been issued. Nor could he find any record in the Chicago Police Department's internal warrant recall book that the Chicago Police Department had ever received any notification from the Clerk of the Court that the warrant had in fact been recalled by judicial order. [App. 48-49].

The case was continued to February 10, 1975.* On that date the last remaining charge against Respondent was dismissed. On March 25, 1975, several months after a judge had ordered the warrant quashed and warrant recall forms processed, Respondent was arrested in her home pursuant to that arrest warrant. Although Respondent explained to the arresting officers that the case against her had been dismissed and the warrant recalled, she was taken into custody, stripped naked, and searched while being observed by Chicago police officers. She was imprisoned for six to seven hours, prior to being released. Following her release from police custody, she was hospitalized for five days and received medical treatment.

On April 10, 1975, she appeared in court once again and was discharged.

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* The "half-sheet," the official court record of the case at issue is a perfect jumble. [App. 42]. It shows dates and warrant recall numbers crossed out. Small wonder the warrant recall form was never properly processed.

STATEMENT OF CASE

Respondent filed the instant action under 42 U.S.C. § 1983 against the City of Chicago, the Chicago Police Department, the arresting officers, and the Clerk of the Court. The district court granted motions to dismiss on behalf of all the defendants, other than the Clerk of the Court. In respect to the Clerk of the Court, the district court granted a motion for summary judgment supported by affidavits that, on their face, are conclusory in nature and internally contradictory. No opportunity for cross-examination or discovery was afforded Respondent.

The Court of Appeals for the Seventh Circuit reversed the district court in every respect, stating:

> It seems clear that appellant sustained a violation of constitutional rights by being arrested and detained pursuant to an invalid warrant. The defendants should not be permitted to 'get off the hook' by merely pointing the finger at each other. Someone is surely at fault for failing to establish or execute appropriate procedures for preventing such serious malfunctionings in the administration of justice. Plaintiff should be entitled to discovery in order to determine who is the true culprit responsible for the wrong done to her.

Murray v. City of Chicago, 634 F.2d 365, 366 (7th Cir. 1980). The Clerk of the Court alone filed a *writ of certiorari.*

SUMMARY OF ARGUMENT

Petitioner does not contest that procedures established by his office or improper performance of ministerial duties by deputy clerks acting under his supervision and control directly or indirectly caused Respondent to suffer a gross deprivation of her civil rights. Instead he argues that his status as a court official entitles him to absolute derivative immunity from civil liability under the Civil Rights Act even if he failed to establish adequate procedures to assure enforcement of judicial orders and even if he failed to properly supervise his employees.*

If, on the present state of the record, the Clerk of the Court prevails, no courtroom personnel can ever be held liable under the Civil Rights Act regardless of any act they perform or fail to perform. No officials, including judges themselves, enjoy so sweeping an absolute immunity. Nothing in this Court's prior interpretation of the Civil Rights Act countenances such immunity.

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* Amicus Curiae does not necessarily contend that Petitioner in this instance did in fact fail to establish adequate procedures, or that any individual clerk acted improperly or carelessly or even that Petitioner has in fact failed to carry out his responsibility to supervise deputy clerks in the performance of their duties. On the present state of the record, affidavits notwithstanding, we simply do not know. Indeed the affidavits raise more questions than they answer.

ARGUMENT

I.

NO REASON EXISTS TO AFFORD A CLERK OF THE COURT ABSOLUTE IMMUNITY UNDER THE CIVIL RIGHTS ACT WHERE HE FAILS TO GIVE EFFECT TO A JUDICIAL ORDER.

Petitioner argues that he is entitled to sweeping absolute immunity from any civil liability for three reasons. First, he contends that he is a mere agent of the Court, answerable to and acting at the direction of the Court alone. He contends that he partakes derivatively of the absolute immunity enjoyed by judges. The facts belie the claim. The Clerk of the Court of Cook County is a politically elected official, responsible to the party that has slated him and to the electorate that voted him into office. *See Ill. Rev. Stat.* ch. 25, § 1.

Secondly, seeking to enlist the sympathy of this Court, and pandering to a legitimate concern for efficiency in the administration of justice, Petitioner pleads an over-burdened court system as an excuse for whatever systemic failure might otherwise be laid at his door. This appeal to sympathy is of no constitutional weight. Indeed, the more over-burdened and impersonal a large metropolitan court system is, the more essential are effective and efficient procedures to protect the integrity of its operation. Where the personal touch cannot readily remedy wrongs, only the smooth operation of established procedures protects essential liberties.

Third, Petitioner claims that any attempt to impose civil liability upon him interferes with the free exercise of his discretion in establishing procedures for the efficient operation of the court system. This argument is arrant nonsense. Far from deterring Petitioner from es-

tablishing effective procedures fear of potential liability will goad him to improve upon them.* Removal of that fear of liability by this Court is hardly likely to enhance a performance that already falls far short of the optimal.** *See Owen v. City of Independence*, 445 U.S. 622, 650-51 (1980).

Amicus curiae is prepared to concede that where a clerk of court merely follows the dictates of a judicial order he cannot incur liability under the Civil Rights Act for whatever wrongs may flow therefrom. By following a judicial order he is *ipso tanto* invested with the immunity that attends the judge's act, when the judge acts in a judicial capacity. *Slotnick v. Garfinkle*, 632 F.2d 163, 166 (1st Cir. 1980); *Ashbrook v. Hoffman*, 617 F.2d 474, 476-77 (7th Cir. 1980); *Williams v. Wood*, 612 F.2d 982, 984-86 (5th Cir. 1980); *Lockhart v. Hoen-*

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* It was fear of section 1983 civil liability that led Petitioner to warn the deputy clerks who work under his supervision and control:

> From time to time the clerk will be required to process motions to recall warrant [sic] and motions to vacate bond forfeitures. This is a particularly crucial area for the clerks, as a failure to follow the correct procedure may expose both the individual clerk and the clerk's office to liability under the Civil Rights Act Title 42 U.S.C. ¶1983 as an infringement of a defendant's civil rights. [App. 45].

Properly speaking the clerk does not "process" *motions* to recall warrants at all; he processes *orders*, signed by a judge, quashing the arrest warrant and ordering that it be recalled.

** On this record, we do not know whether the failure to recall this particular arrest warrant was an inadvertent and rare event or a frequent occurrence caused by fatally defective procedures or by consistently inadequate supervision of those employees charged with carrying out those procedures. However, from the reported cases alone, it is clear that this case does not represent a unique failure in the Circuit Court of Cook County. *E.g., Powe v. City of Chicago*, No. 80-2731 (7th Cir., Nov. 11, 1981).

stine, 411 F.2d 455, 459-60 (3d Cir.), *cert. denied*, 396 U.S. 941 (1969).

Such, however, is not the case here. Here, the actions or the failure to act that are challenged are not the mere adherence to a judicial order. On the contrary. The challenged act is that a clerk *failed* to give effect to a judicial order, thereby making it a nullity.

Congress, in passing the Civil Rights Act, clearly intended the sting of potential civil liability for any violation of basic civil rights to encourage public officials to put their own houses in order. *See, e.g., Owen v. City of Independence*, 445 U.S. at 650-51. Congress intended that procedures be established by public officials to assure that civil rights are protected. *See, e.g., id.* It further intended that public officials supervise their employees so that violations of civil rights would not occur. *See Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 n.58 (1978).

Cognizant of these aims this Court has repeatedly said that claims for official immunity—be that immunity absolute or merely partial—must be strictly construed lest entire spheres of government activity elude the restraint to which Congress intended them to be subject. *E.g., Butz v. Economou*, 438 U.S. 478 (1978); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Accordingly, any blanket claim for official immunity has been scrupulously examined and sparingly granted. *Id. See also Dennis v. Sparks*, 449 U.S. 24, 29 (1980); *Owen v. City of Independence*, 445 U.S. at 651; *Ferri v. Ackerman*, 444 U.S. 193, 203-04 (1979); *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976). Only where official immunity is an essential and necessary prerequisite for the free exercise of that discretion that inevitably must attend certain acts of government has this Court recognized absolute immunity from the operation of the Civil Rights Act. *See, e.g.,*

Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719, 736 (1980); *Ferri v. Ackerman*, 444 U.S. at 203-04.*

Here, there is no exercise of official discretion that must be protected. The only acts at issue are purely ministerial in nature. Courts have not generally recognized the existence of an absolute immunity from the operation of the Civil Rights Act for acts of a purely ministerial nature. *E.g., McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972); *Illinois v. May*, 251 Ill. 54, 95 N.E. 999 (1911). Both the act of Petitioner in establishing warrant recall procedures pursuant to General Order 74-8(M) and the acts that the deputy clerk was to have performed, but failed to perform, in order to give effect to a judicial order, are purely ministerial in nature. There is no basis in law to argue that such acts must, as a matter of law, be absolutely immune from liability under the Civil Rights Act. *McCray v. Maryland*, 456 F.2d at 3-5.

The mere fact that Petitioner acts as the handmaiden of the court does not give rise to a derivative immunity even when he fails to obey a judicial order. The cases that seem to hold that a clerk of the court is invested with such derivative immunity arose in situations where the clerk was merely giving effect to a judicial order. In such cases he clearly should not be held liable for following the order of the judge. *Slotnick v. Garfinkle*, 632 F.2d at 166; *Lockhart v. Hoenstine*, 411 F.2d at 459-60. Cases that extend immunity without undertaking such an analysis are not decided on a principled basis, *e.g.*,

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* For an excellent recent discussion of the policy concerns underlying the concept of official immunity see generally Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*. 1980 SUPREME COURT REVIEW, 281.

Davis v. McAteer, 431 F.2d 81, 82 (8th Cir. 1970), or rely exclusively on cases that *do* involve the exercise of judicial discretion. *City of Louisville v. Bergel*, 610 S.W.2d 292, 293 (Ky. 1980) (relying upon *Henry v. Wilson*, 249 Ky. 589, 61 S.W.2d 305 (1933), involving a judge's exercise of judicial discretion); *Rodriguez v. New York*, 55 Misc.2d 669, 674, 285 N.Y.S.2d 896, 901 (1967) (relying on *Jameison v. New York*, 4 Misc.2d 326, 158 N.Y.S. 2d 496 (1956), involving a court clerk's exercise of judicial discretion). As the *McCray* court appropriately recognized:

> A . . . defense is afforded all public officers who act in obedience to a judicial order or under the court's direction. It was this defense which protected the court clerk in Sullivan v. Kelleher, Rhodes v. Houston, Ginsburg v. Stern, and Niklaus v. Simmons. Thus in every instance cited by the District Court where "judicial immunity" was accorded a court clerk, he was in fact acting regularly and lawfully. McCray here alleges very different circumstances—he asserts that the clerk impeded the filing of his papers. If the claim is true, the clerk was acting in direct violation of his statutory duties. In cases where an official's lawful authority was exceeded or the court order not followed no immunity was recognized and the officer was held liable under section 1983 if his actions abridged an individual's federally protected rights. In the situation alleged by plaintiff in this case, the clerk is entitled to no more protection than any other state ministerial functionary who fails to discharge a mandatory duty. (citations and footnotes omitted).

McCray v. Maryland, 456 F.2d at 5.

Petitioner is not, as he suggests, subject either to the pleasure or the will of any judicial officer. He is an elected public official, with clear statutory duties, *see, e.g.*, ILL. REV. STAT. ch. 25, §§ 1-15, and answerable ulti-

mately to the public. He cannot therefore lay claim to a derivative immunity when the source of his powers, duties, and obligations is independent of any judge.

II.

PETITIONER CANNOT AVOID RESPONSIBILITY FOR HIS EMPLOYEES IF HE FAILS TO SUPERVISE THEIR ACTIONS ADEQUATELY

Petitioner suggests that he cannot be held liable for the acts of his employees under the Civil Rights Act on the basis of *respondeat superior*. Such is simply not the law; he may be held liable under section 1983 for a failure to properly perform his supervisory responsibilities. *Monell v. New York City Department of Social Services*, 436 U.S. at 694 n.58. Petitioner begs the question in stating that the mere negligence of an employee cannot become the predicate for such liability. *See Parrat v. Taylor*, 49 U.S.L.W. 4509 (May 18, 1981). The fatal flaw in that argument is that the district court, in untimely fashion, forestalled precisely the inquiry that Petitioner contends was made. There was no opportunity given to Petitioner to demonstrate that this was indeed a single act of negligence. So too there was no opportunity given to Respondent to demonstrate that her case was not an isolated occurrence but was symptomatic of a systemic and repeated failure in the procedures established by Petitioner and in the supervision he accords to the work of his employees. Petitioner cannot contend that no liability exists for a repeated failure to properly exercise supervisory control. This Court has said that such liability does exist. *Monell v. New York City Department of Social Services*, 436 U.S. at 694 n.58.

III.

THE COURT SHOULD NOT REACH THE MERITS AND SHOULD REMAND FOR FURTHER DISCOVERY.

Unless this Court is prepared to hold that the Clerk of the Court, as an elected public official, can never be held liable for any act, even when he willfully fails to give effect to a judicial order, this case should be remanded for further proceedings.

On the present state of the record, blame for the failure to recall the warrant cannot be squarely laid on any doorstep. What is apparent is that the procedures established to recall warrants are either generally inadequate or merely did not function in this particular instance. As the court of appeals correctly observed in this case: "Summary judgment should not be granted unless it is clear that upon no conceivable state of facts as shown by the proof could a plaintiff recover. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962)." *Murray v. City of Chicago*, 634 F.2d at 366.

Even if it is established that a systemic failure in the procedures established by Petitioner or inadequate supervision of employees entrusted to carry out those procedures* indirectly caused the harm Respondent suffered, multiple defenses available in tort law are still applicable. *E.g., Imbler v. Pachtman*, 424 U.S. at 418. Thus it may well be that the proximate or intervening

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* Surely Petitioner would not suggest that if the procedures he had established to recall warrants failed in fifty percent of the cases, he would still be immune from civil liability. So too it stretches reason to suggest immunity would exist even if Petitioner had knowledge that his employees regularly stuffed warrant recall forms into the nearest trash can rather than deliver them to the Chicago Police Department.

cause of the violation of Respondent's civil rights was not the failure to recall an arrest warrant, but rather police behavior that was totally excessive and unwarranted.*

Amicus Curiae urges this Court not to use the occasion of these exceedingly sketchy facts as an opportunity to extend the immunity of court clerks to its broadest possible reach. In the event this Court does not wish summarily to affirm the opinion of the Court of Appeals for the Seventh Circuit, nothing would be lost and much gained in dismissing the writ, as improvidently granted and remanding the case for further proceedings in conformity with the opinion of the Court of Appeals for the Seventh Circuit.

* The Chicago Police Department has been sued for its habit of strip searching arrested females on charges as innocent as traffic violations. A consent order agreeing to stop wholesale strip searches has been entered in the case of *Doe v. City of Chicago*, No 79 C 789 (N.D. Ill., Mar. 26, 1980).

CONCLUSION

For all the foregoing reasons, Amicus Curiae respectfully submits that this Court should either affirm the judgment of the Court of Appeals for the Seventh Circuit or, in the alternative, dismiss the writ as improvidently granted.

Respectfully submitted,

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